71-1168

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

STRECKFUS STEAMERS, INC.,
Plaintiff-Petitioner,

CAPT. WM. F. CARROLL, CAPT. CORNELIUS RIEMER, CAPT. HARRY GRIESHABER, THOMAS P. CHAPMAN, THOMAS McKIBBEN, MARVIN CHAPMAN, ARTHUR JACKSON, GEORGE V. JOHNSON, MRS. BETTY SCHWALLER, MRS. LILY COLD, MRS. LUCY FOSTER, WILLIE COLEMAN, JOHN CARROLL, SPENCER T. JONES,
Defendants-Petitioners,

vs.

CITY OF ST. LOUIS and JOHN K. TRAVERS, Collector of the City of St. Louis,
Defendant-Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri

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To the Supreme Court of Missouri

The Petitioners, Streckfus Steamers, Inc., plaintiff in a suit for declaratory judgment, and Captain William F. Carroll, Captain Cornelius Riemer, Captain Harry Grieshaber, Thomas P. Chapman, Thomas McKibben, Marvin Chapman, Arthur Jackson, George V. Johnson, Mrs. Betty Schwaller, Mrs. Lily Cold, Mrs. Lucy Foster, Willie Coleman, John Carroll and Spencer L. Jones, masters, officers and seamen, all employees of plaintiff and co-defendants representing themselves and others as a class, also peti-

tioners herein, respectfully pray that a Writ of Certiorari issue to review the opinion of the St. Louis Court of Appeals in favor of the City of St. Louis, Mo. and John K. Travers, its Collector, also defendants, which became final on December 13, 1971 when the Supreme Court of Missouri denied petitioners' application to transfer the case from the St. Louis Court of Appeals to the Supreme Court of Missouri, and to quash the opinion of the St. Louis Court of Appeals.

OPINION BELOW

The decision of the Supreme Court of Missouri denying transfer and the opinion of the St. Louis Court of Appeals, which is reported at 472 S. W. 2d 660 (Mo. 1971) both appear in the appendix hereto. The Circuit Court for the City of St. Louis, Missouri, rendered a judgment in favor of the petitioners accompanied by an opinion, which likewise appears in the appendix hereto. This judgment of the Circuit Court on appeal was reversed and remanded with directions by the St. Louis Court of Appeals.

JURISDICTION

The decision of the St. Louis Court of Appeals reversing the judgment of the Circuit Court and remanding the case with directions was entered on June 15, 1971. A timely motion for rehearing or in the alternative to transfer to the Supreme Court of Missouri was filed by petitioners and was denied on October 6, 1971 by the St. Louis Court of Appeals. A timely application to the Missouri Supreme Court to transfer, filed by petitioners, was denied on December 13, 1971 by that Court and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

The questions involved in this application are as follows:

1. Is the decision of the St. Louis Court of Appeals holding that excursion boats on the Mississippi River which depart or operate excursion trips from St. Louis, Missouri, and return to St. Louis with no intermediary stops are not engaged in Interstate Commerce where in so operating they do so under I. C. C. permit and must of necessity, and do repeatedly cross the middle of the navigable channel on each trip, which forms the boundary line between the States of Missouri and Illinois and thus pass through and operate both in Missouri and Illinois waters on all trips and is not such a holding contrary to the decision of this Court in **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768, and **Central Greyhound Lines v. Mealey**, 334 U. S. 653, 62 L. Ed. 1633, 68 S. Ct. 1260, and the decision by the I. C. C. in **Sound Steamship Lines**, 250 I. C. C. 488, 3 Fed. Car. Cases 30387.

2. Does the fact that the Mississippi River forms the boundary between the States of Missouri and Illinois and the territorial limits of the two states end at their respective sides of the middle of the navigational channel of said river, 3 U.S. Statutes 545; 1 V. A. M. S. 97; 3 V. A. M. S., Chapter 7, p. 211, but which acts also provide that both states shall have concurrent jurisdiction over the entire river, cause an excursion vessel which starts its excursions at St. Louis and terminates them there without any intermediary stops but of necessity must, in so operating, constantly cross over the middle of the navigable channel, favoring neither the Missouri nor the Illinois side and in operating over and passing through the territorial waters of Illinois, as well as those of Missouri, because of such concurrent jurisdiction to lose the characteristic of being engaged in Interstate Commerce?

3. If engaged in Interstate Commerce, may the City of St. Louis obligate plaintiff-petitioner, the employer of captains, officers and seamen aboard its excursion vessels so operating, to withhold from their wages earnings taxes claimed to be due the City of St. Louis without depriving such employee-petitioners of their immunity under the provisions of Section 601 of Title 46, U. S. Code, prohibiting the attachment or arrest of seamen's wages and particularly that part thereof added to such section in 1959, and which reads:

> "* * * **And provided further**, that no part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwise, intercoastal, interstate, or noncontiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, possession, or Commonwealth, or a subdivision of any of them."

4. Has not the St. Louis Court of Appeals by its decision infringed upon the constitutional guaranties afforded these masters, officers and seamen, defendant-petitioners herein, all citizens of the United States granted them by the terms of Article Six, paragraph 2, the Supremacy Clause, Art. I, Sect. 8(3), the 14th Amendment of the United States Constitution?

5. Is not that part of the decision of the St. Louis Court of Appeals holding that the excursion vessels of plaintiff-petitioner never leave the jurisdiction of the State of Missouri even though they leave its territorial waters and enter the territorial waters of Illinois on all voyages and that therefore all wages earned by the employees on said excursion boats are earned in the State of Missouri and subject to the earnings tax provisions of Sections 145.010 to 145.120, inclusive, Revised Code of St. Louis, clearly deprive defendants-petitioners of the immunities conferred

by Section 601, Chapter 46 U.S.C. and thereby contravene Article VI, Section 2 of the United States Constitution, and Article I, Section 8(3) thereof, and the holdings of this Court in **Cornell Steamboat v. United States**, 321 U.S. 643, 88 L.Ed. 978, 64 S.Ct. 768, and in **Greyhound Lines v. Mealey**, 334 U.S. 653, 62 L.Ed. 1633, 68 S.Ct. 6820.

Is not this also an attempt by the Court of Appeals to deprive the State of Illinois of its fair share of taxes on these earnings of seamen by holding that these vessels are engaged in intrastate commerce and therefore subject only to the St. Louis Earnings Tax and was it not the specific purpose of the amendment to Sec. 601 of 46 U.S.C. to relieve seamen and their employers of deciding these complicated tax questions?

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, paragraph 2.

Article I, Sec. 8(3)
of the United States Constitution.

STATUTORY PROVISIONS

Section 601, 46 U.S.C.

STATEMENT OF THE CASE

This case involves a suit for a declaratory judgment brought on July 2nd, 1969, in the Circuit Court of the City of St. Louis, Missouri, by Streckfus Steamers, Inc., petitioner herein, hereinafter referred to as plaintiff-petitioner, against the City of St. Louis and John K. Travers, its Collector of Revenue, respondents herein; and also against Captain William F. Carroll, Captain Cornelius Riemer and other employees, who are defendants-petitioners herein, who plaintiff-petitioner, in its petition al-

leged were seamen and members of the crews of its excursion vessels, the S. S. ADMIRAL and the M/V HUCK FINN. The defendants-petitioners were made parties individually and as representatives of a class constituting such seamen employees of plaintiff-petitioner's company.

The case presents the question of whether or not plaintiff-petitioner may withhold, from the wages of defendants-petitioners earned aboard said excusion boats, the Earnings Tax claimed by the City of St. Louis, Missouri, in view of the amendment to the provisions dealing with attachment and arrest of wages of seamen contained in 46 U. S. C., Section 601, the amendment reads in part:

> "* * * And provided further, That no part of the wages due or accruing to a master, officer, or any other seaman who is a member of the crew on a vessel engaged in the foreign, coastwide, intercoastal, interstate, or non-contiguous trade shall be withheld pursuant to the provisions of the tax laws of any State, Territory, possession, or Commonwealth, or a subdivision of any of them."

Plaintiff-petitioner conducted its business pursuant to a Certificate of Convenience and Necessity, issued to it by the Interstate Commerce Commission under Part 3 of 49 U. S. C., Paragraphs 901 to 923, which certificate authorized plaintiff-petitioner to operate excursion boats in round-trip excursion service in interstate and foreign commerce from all ports and points along the Mississippi, Ohio and Illinois Rivers and returning to the port or points of origin. (See Record, p. 42 and Appendix, p. A-11, for copy of Certificate.) This was offered and received in evidence, but not mentioned in the opinion of the St. Louis Court of Appeals. Under this, plaintiff-petitioner has operated its excursion vessels on the Mississippi River from the City of St. Louis, Missouri, and returning to the point of origin without stopping elsewhere along the

route. The Mississippi River forms the eastern boundary of Missouri between the States of Missouri and Illinois and their respective territorial boundaries lie at the center of the navigable channel of said river. Act of Admission of Missouri into the Union, 3 U. S. Stat. 545, 1 V. A. M. S. 97, 3 V. A. M. S., Chapter 7, p. 211. Missouri and Illinois are given concurrent jurisdiction over the river by the same act.

In connection with operating such daily excursions, the excursion vessels of plaintiff-petitioner company on all excursions more or less constantly cross the middle thread or center of the channel favoring neither side and steering the boat according to conditions that exist at the time of the travel (See Opinion Appendix, p. A-2). Consequently, the boats navigate the territorial waters of both Missouri and Illinois.

The Respondents City of St. Louis and its Collector of Revenue plead that plaintiff-petitioner's vessels were not engaged in interstate trade or commerce on these excursion voyages within the meaning of Section 601 of 46 U. S. C. and prayed the Court to declare the wages of all of plaintiff's employees on their excursion vessels subject to its Earnings Tax, and plaintiff, itself, subject to the withholding provisions of the taxing ordinance.

The defendant employees, also petitioners herein, in this Court, joined with plaintiff-petitioner in seeking the immunity provided by Section 601 of 46 U. S. C.

Plaintiff-petitioner contended and contends that by thus operating on the Mississippi River and frequently and on all trips operating in part in Illinois waters, and in part in Missouri waters, it operates in Interstate Trade between the States of Illinois and Missouri and the wages of its seamen-employees, defendants-petitioners, are exempt from withholding for state taxes under 46 U. S. C. 601. The trial Court (the Circuit Court of the City of St. Louis) granted

a judgment in favor of petitioners. In connection therewith the trial Court wrote a Memorandum Opinion on January 6, 1970 (Record, p. 39, 40) holding that it clearly appears under **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978:

> "* * * that a water carrier on a boundary river is engaged in interstate commerce even though its point of departure is in the same state as its point of destination, if in so traveling it passes through the territorial waters of another state without landing there" (Appendix p. A-9).

Consequently the character of the activities carried on by plaintiff is one involving interstate commerce. The trial Court held further that an activity either involves Interstate Commerce or it does not, irrespective of the purpose or objective behind the Court's inquiry. It, as well as the St. Louis Court of Appeals, considered the words "Interstate Trade" as used in Section 601 of Chapter 46 to be synonymous with the words "Interstate Commerce." The trial Court also held that the broad term applied to the word "seamen" would cover the emplcyee-defendants aboard these vessels. The Court held that the exemption afforded by Section 601 of 46 U. S. C. applied to the wages of defendant-employees.

The City of St. Louis and John K. Travers, its collector, defendant-respondents herein, appealed to the St. Louis Court of Appeals. That Court reversed the trial Court and held (Appendix, p. A-8) that all the defendant-employees of plaintiff-petitioner herein (also co-petitioners herein), working aboard said vessels, as far as they, themselves, were concerned, and those whom they represented, as a class, remain at all times within the jurisdiction of Missouri because of its concurrent jurisdiction over the river with Illinois and, consequently, were not engaged in Interstate Commerce within the meaning of Section 601 of

46 U. S. C. The Court treats in its opinion the words "jurisdiction" and "sovereignty" as being synonymous. This it held in spite of its finding that plaintiff-petitioner's vessels on all voyages more or less constantly cross the middle of the navigable channel of the Mississippi River and thus operate at times in Missouri territorial waters and at times in Illinois territorial waters; that the wages of all these employee-defendants were subject to the Earnings Tax of the City of St. Louis and plaintiff-petitioner would have to withhold these taxes from wages earned aboard these ships and remanded the case to the Circuit Court of the City of St. Louis for further proceedings in accordance with its opinion.

Plaintiff-petitioner herein and defendants-petitioners timely filed their motion for rehearing or to transfer to the Supreme Court of Missouri, which was denied in the St. Louis Court of Appeals, and by timely application to the Supreme Court of Missouri for transfer. The Supreme Court of Missouri denied that thus exhausted all plaintiff-petitioner's and defendant-petitioners' state court remedies available to them. This Petition for Certiorari has been timely filed with this Court.

The Federal question as to the right to withhold state taxes from wages of seamen on interstate operation was raised under Act 601 of Title 46 U. S. C., a Federal Act at all stages. No constitutional questions were raised in the trial Court because the decision there was in favor of plaintiff-petitioner and defendants-petitioners. On appeal, after the Court of Appeals rendered its opinion that plaintiff-petitioner was engaged solely in intrastate commerce and, hence, in spite of the provision of Section 601, plaintiff-petitioner was required to withhold City Earnings Taxes from the wages of defendants-petitioners, the question that the opinion of the Court of Appeals contravened Paragraph 2 of Article VI of the United States Constitu-

tion and Article I of Section 8 (subsection 3) was promptly raised in the St. Louis Court of Appeals by both the plaintiff-petitioner and defendants-petitioners in their Motion for Rehearing or to transfer the case to the Missouri Supreme Court and later after the overruling of same it was again raised in their application to the Supreme Court for Order to the St. Louis Court of Appeals to transfer, which latter motion was again denied. The applicable provisions of the United States Constitution are: The Supremacy Clause, Article VI, Section 2 and the Commerce Clause, Article I, Section 8 (Subsection 3). The raising of the questions at that time was specifically approved in **Missouri v. Gehner**, 281 U. S. 313 (1929) at l.c. 320:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. **Citizens National Bank v. Durr**, 257 U. S. 99, 106. But here the company, at the first opportunity, invoked the protection of the federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and nontaxable assets. It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the federal questions

here presented and is entitled to have them considered. **Saunders v. Shaw**, 244 U. S. 317, 320. **Ohio ex rel. Bryant v. Akron Park District, ante, p. 74.**"

The Court of Appeals, in its opinion, admitted that at St. Louis the boundary between the States of Missouri and Illinois lies in the middle of a navigable channel of the Mississippi River in view of the provisions of 3 U. S. Statutes 545, 1 V. A. M. S. 97 and 3 V. A. M. S., Chapter 9, page 211, but in its effort to avoid the effect of the decision of **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768 took the position that the Amendment to Section 601 of U. S. C. 46 was for the purpose of preventing multiple withholdings from the wages of seamen who might be **in ports** of different states when they received their pay and that, consequently, the Amendment was added so as to protect such employers of seamen. This, it claims, is disclosed in 2 U. S. Code Congressional and Administrative News, 86th Congress, First Session 1959, pp. 2530-2536. It then concludes that since the seamen are paid only in St. Louis and that the mere fact that the vessels in question cross the middle of the channel of the river and travel in Illinois territorial waters would not place them in interstate commerce as a practical matter insofar as their compensation and payment thereof is concerned. Consequently, it reasoned that the withholding of Earnings Tax from wages of members of the crew would place no burden on the employer other than that associated with other wage earners or employees within the City of St. Louis and that considering interstate trade as a practical concept, the term as used in Section 601 would not encompass the operations of the STEAMER ADMIRAL and the M/V HUCK FINN, the vessels herein in question.

In trying further to avoid the effect of this Court's decision in **Cornell Steamboat v. United States**, 321 U. S.

634, 88 L. Ed. 978, 64 S. Ct. 768, the St. Louis Court of Appeals contended that that case could not have any effect in a case involving withholding taxes as it dealt merely with the right of the I.C.C. to deal with the rates and regulations set by the Interstate Commerce Commission, and which had to be uniform. The St. Louis Court of Appeals, in support of this position, relies on the earlier cases of this Court such as in **Cornell Steamboat Company v. Sohmer**, 235 U. S. 549, 59 L. Ed. 355, 35 S. Ct. 162 (1915). The St. Louis Court of Appeals, however, does admit that this holding was subsequently not followed in **Central Greyhound Lines, Inc. v. Mealey**, 334 U. S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948), which criticized the earlier **Cornell Steamboat** case in 235 U. S., supra. The St. Louis Court of Appeals does not mention that the **Central Greyhound** case involved the imposition without apportionment of a state gross receipts tax on passengers carried in interstate commerce.

The St. Louis Court of Appeals also bases its decision on cases such as **Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Company v. Bay**, 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208, none of which cases conform to the concept as later expressed by this Court as to what does and what does not constitute interstate commerce.

The Court also claims that at the time of the admission of the State of Missouri to the Union, the boundary line between it and the State of Illinois was fixed at the middle of the main navigable channel of the Mississippi River, but that the Act goes further and confers concurrent jurisdiction on the two states over the river. From this, it takes the position that because of this concurrent jurisdiction, the vessels in question that leave and return to the Port of St. Louis without interrupting their voyage remain at all times within the jurisdiction of the State of Missouri even though they on all trips cross the middle

of the channel of the river and enter the Illinois territorial waters and, hence, are not engaged in Interstate Commerce; that the activities of plaintiff-petitioner are purely intrastate, and the Court finally concluded that both the employees of plaintiff who work on these vessels and that plaintiff are not covered by the provisions contained in Section 601 of 46 U. S. C., as long as these vessels remain in the excursion trade described in the opinion.

The holding of the St. Louis Court of Appeals was fully challenged on motion for rehearing on the grounds that it was contrary to the aforestated constitutional provisions and to the prevailing law as enunciated by the Supreme Court of the United States in the cases of **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768, wherein the Court specifically held although not in N. J. that "While moving on New Jersey waters, Cornell's vessels are not at that time at a place in New York," and to the case of **Central Greyhound Lines, Inc. v. Mealey**, 334 U. S. 653, 92 L. Ed. 1633, and was contrary to the views expressed by the I. C. C. in its opinion in the case of **Sound Steamship Lines**, 250 I. C. C. 488, 3 Fed. Car. Cases 30387, and contrary to the provisions of Article VI, Section 2 and Section 8(3) of Article I of the United States Constitution, but was denied. It was again challenged for the same reasons on petitioner's motion to transfer to the Supreme Court of Missouri but which Court refused to transfer the case.

REASONS FOR GRANTING WRIT

The St. Louis Court of Appeals refused to apply to defendants-petitioners the immunity granted them by Sec. 601 of 46 U. S. C. whereby it is provided that no part of the wages due or accruing to a master, officer or any other seaman who is a member of the crew on a vessel engaged in interstate trade shall be withheld pursuant to the tax laws of any State, Territory, Possession or Commonwealth or a subdivision thereof. By so doing it deprived these seamen of a privilege granted them by Article VI, Cl. 2 of the United States Constitution and Clause 8(3) of Art. I thereof.

a. This decision of the St. Louis Court of Appeals is a decision which affects many carriers which operate on the Mississippi River and not only those engaged in the excursion boat business. It presents a very vital question to these operators as to withholding taxes. Since 1945, traffic on the Mississippi River from Minneapolis, Minnesota, to the Passes at its mouth in Louisiana increased from 23,000,480 short tons to 147,652,609 short tons in 1970 (see **Waterborne Commerce of the U. S., Part II, Waterways and Harbors and Gulf Coast on the Mississippi River System,** the official publication of the United States Engineers, these figures appearing respectively in the 1945 edition at page 130 and in the 1970 edition at page X). Consequently, many of these operators will be affected by the decision of the St. Louis Court of Appeals.

b. The St. Louis Court of Appeals denied to these masters, pilots and seamen, defendants-petitioners herein, representing themselves and other similarly situated employees whom they represented as a class the immunity provided them by Sec. 601 of 46 U. S. C., by holding that plaintiff-petitioner, while operating their excursion ves-

sels on the Mississippi River, departing from the City of St. Louis and returning thereto without any intermediary stops, was not in interstate commerce, even though on all trips these vessels cross the middle thread of the main channel more or less constantly, favoring neither but steering the vessels according to conditions that existed at the time of travel (Appendix, p. A-7). The middle of the main channel forms the boundary line between these two states (Act of Admission of the State of Missouri into the Union, 3 U. S. Stat. 545; 1 V. A. M. S. 97, 3 V. A. M. S., Chapter 7, p. 211. Thus, the plaintiff-petitioner operates on all trips a substantial part of the time within the territorial waters of Illinois.

The question of what constitutes interstate commerce has been repeatedly held, indeed, it is Hornbook law that "the question of what is interstate commerce is a federal question, and the decision of the United States Supreme Court defining such commerce and determining the validity of regulations thereof and interferences therewith are controlling," 15 Am. Jur. 2d, Commerce, §5.

In **Oskey Brothers Petroleum Corp. v. Gorder**, 109 N. W. 2d 893 (1961), the Supreme Court of South Dakota stated in this regard:

> "Whether a transaction was interstate commerce is dependent upon the interpretation of the Federal Constitution upon which the judicial determination of the Supreme Court of the United States is final."

Further, in **Osgood Company v. Bland**, 24 Tenn. App. 126, 141 S. W. 2d 505 (1940), the Tennessee Court of Appeals held:

> "Whether a transaction by a foreign corporation is interstate commerce, as distinguished from intrastate commerce, is a federal question and the decisions of the United States Supreme Court must be followed by our state courts."

This being so, the St. Louis Court of Appeals must follow the decisions of this Court on this subject. Its decision that plaintiff-petitioner and defendants-petitioners are not engaged in interstate commerce flies directly in the teeth of the latest pronouncements of this Court on this subject, which holds that a vessel engaged in commerce between two points in the same state, and in so doing passing through territorial waters of an adjoining state, forming a common boundary between them, is engaged in interstate commerce and subject to regulation of the Interstate Commerce Commission (Part 3 of the Act) although its vessels never land in the adjoining state, **Cornell Steamboat v. United States**, 321 U. S. 634, 88 L. Ed. 978, 64 S. Ct. 768 (1943). The same conclusion was reached as to the auto-bus business in **Central Greyhound Lines v. Mealey**, 334 U. S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948).

c. The St. Louis Court of Appeals fails in its opinion to mention the fact that these excursion trips are conducted by plaintiff-petitioner pursuant to a Certificate of Convenience and Necessity from the Interstate Commerce Commission offered and received in evidence, hereto attached (Appendix, p. A-11) and appears as part of the record at page 42, probably because that Commission has held in **Sound Steamship Lines**, 250 I. C. C. 488, 3 Fed. Car. Cases 30387, that an excursion vessel such as these operated from a point in one state (New York City) and returning to the same point without stopping but passing through territorial waters of an adjoining state (New Jersey) though not stopping there, was engaged in interstate commerce and requires a Certificate of Convenience and Necessity from the Interstate Commerce Commission.

d. The St. Louis Court of Appeals, in trying to justify its failing to follow the case of **Cornell Steamboat Co. v. United States**, reported in 321 U. S. 634, 88 L. Ed. 978,

64 S. Ct. 768 (1943), argues that that case did not involve a taxation question but only the necessity of holding an I. C. C. Certificate, and, hence, is not applicable. It cites an earlier case involving **Cornell Steamboat Co. v. Sohmer**, 235 U. S. 549, 59 L. Ed. 355, 35 S. Ct. 162 (1915), involving gross earnings tax of New York State on earnings arising in part from voyages over adjoining territorial waters. This Court at that time (1915) held that vessels proceeding from one point in a state to another point in the same state, but in doing so, passing through territorial waters of an adjoining state were not in interstate commerce and all of its gross earnings were subject to that tax. That earlier decision was not followed by this Court in **Central Greyhound Lines, Inc. v. Mealey**, 334 U. S. 653, 92 L. Ed. 1533, 68 S. Ct. 1260 (1948), involving the same New York gross receipts tax as was involved in the earlier **Cornell Steamboat** case. This Court criticized the holding in the earlier **Cornell Steamboat** case at l.c. 642 and would not follow same. The Court held at l.c. 659:

> ". . . But to label transportation across an interstate stream 'local commerce' for some purposes when it is 'interstate commerce' in other relations, see, e.g., **Covington & Cincinnati Bridge Co. v. Kentucky**, 154 U.S. 204, is to use loosely terms having connotations of constitutional significance. To call commerce in fact interstate 'local commerce' because under a given set of circumstances, as in the **Lehigh Valley** case, a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction. Especially in the disposition of constitutional issues are legal fictions hazardous, because of the risk of confounding users and not merely readers. The kind of confusion to which the **Lehigh Valley** opinion has given rise results from employing a needless fiction—calling commerce local which in

> fact is interstate—as a manner of stating that a particular exercise of State power is not invalid even through it affects interstate commerce. The difficult task of determining whether a phase of commerce, concededly interstate, is subject to a particular incidence of State regulation, through taxation or otherwise, is not lessened by calling interstate commerce local commerce in order to sustain its local control. To state this persistent and protean problem of our federalism in the form of a question-begging fiction, is not to answer it."

Thus, this Court held that the New York gross receipts tax must be apportioned as a substantial portion of Greyhound's trips passed through adjoining states although starting and ending in the State of New York, and, consequently, Greyhound Lines was engaged in interstate commerce. In this present case, as found by the St. Louis Court of Appeals, the vessels **more or less constantly crossed the middle of the channel** according to varying conditions, thus navigating the territorial waters of Illinois and Missouri frequently on these voyages. They never remain only on one side (Appendix, p. A-2). Thus, the rule of both **Cornell Steamboat Co.**, 321 U. S. and **Central Greyhound Lines**, 334 U. S. apply here.

From the foregoing, it is also clear that it makes no difference on the question of what constitutes interstate commerce whether the case involves taxation or the jurisdiction of the I. C. C. to require a Certificate of Convenience and Necessity. What constitutes interstate commerce remains the same and the trips, such as are carried on by plaintiff-petitioner, are interstate commerce and no part of the wages of defendants-petitioners can be withheld for state and local taxes.

Another case by which the St. Louis Court of Appeals attempts to justify its failure to follow the dictates of

Section 601 of Chapter 46 U. S. C., **Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. Bay**, 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208, decided in 1908, did not involve either an I. C. C. permit or a tax on interstate operation such as here but the Sherman Act, and needless to say, is of a time when the present concept of interstate commerce had not been extended as it is now.

e. Another attempt to try and circumvent the express provisions of Section 601 of 46 U. S. C. and the decisions of the **Cornell Steamboat** case reported in 321 U. S. and **Central Greyhound Lines** reported in 334 U.S., both supra, as to what constitutes interstate commerce is the assertion by the St. Louis Court of Appeals in its opinion that the proviso added to Section 601 had a specific purpose, and that according to that Court it was to prevent multiple withholdings from the wages of seamen who might be in ports of different states when receiving their pay. It further recites that the purpose **was also stated** that instead of being subject only to the withholding laws of their state of residence, or their home port, every state, local political subdivision or municipality having such power, could require withholding merely because the seaman happened to be in that jurisdiction **when paid.**

But that was not the only reason: In speaking of the need for the bill the Senate Report appearing in 2 U. S. Code Congressional and Administrative News, First Session, 1959, pp. 2530 to 2536 is set out at page 2531, as follows:

> The important maritime States of New York and Massachusetts have recently enacted withholding provisions in their income tax laws that would affect seamen's wages. It is likely that other States will do the same. As a result of the conflict between the Federal law and the State provisions, the shipowners are faced with a staggering potential legal and financial

liability if they do not withhold as apparently directed by title 46, United States Code, section 601, or if they do withhold as apparently required under State tax laws. Your committee believes legislation is immediately required to resolve this dilemma.

Furthermore, your committee believes that the costly and complex bookkeeping imposed on seamen and shipowners by multiple State withholding laws is all out of proportion to the benefit to the States in the case of seamen. All the more so since it is likely that several States will enact similar withholding provisions. Consequently, the shipowner will have to prepare withholding tax forms for each seaman for each State for each voyage covering the wages to be paid in each State.

Similarly, the seamen will be subject to multiple taxation by a large number of States and municipalities. The multiple State tax laws imposed upon the seaman will make it impossible for him to handle his tax without employing professional help.

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and the effect of the legislation is stated at page 2532, as follows:

"S.1958 would relieve the seamen and the steamship companies of the accounting burden enumerated above; it would also clarify the legal conflict between State and Federal law.

It is to be noted, however, that this legislation will not relieve the seamen of his liability to pay taxes properly due, will not effect the Federal withholding taxes, and will not in any way impair the general tax authority of the States."

Of this, the St. Louis Court of Appeals makes no mention.

From the foregoing, **the place of payment is not the determining factor but the possibility that different with-**

holding taxes of different states and their subdivisions will have to be withheld. Section 601 was amended when the States of New York and Massachusetts had adopted income tax withholding provisions and such action by other states was anticipated. Since 1969 the State of Illinois has such a withholding provision in its income tax statutes. By Chapter 120, Section 7-701 of the Illinois Revised Statutes of 1969, it is specifically provided that:

> "Every employer maintaining office **or transacting any business in state** and required to withhold federal income tax on compensation paid in state to an individual **must deduct and withhold, from wages paid or earned on or after Aug. 1, 1969,** an amount equal to 2½% of compensation after deducting appropriate withholding exemption attributable to payroll period." [Emphasis Ours.]

Consequently, Illinois does require any corporation doing business within its state to withhold from the wages of its employees from wages paid or earned as of August 1, 1969, the requisite income tax. As all defendants-petitioners earn part of their wages in Illinois territorial waters, we are dealing with the exact situation which Section 601 of 46 U. S. C. sought to remedy.

Even had Illinois not enacted such a statute or sought to enforce it, it would not change the end result for in the case of **Greyhound Lines v. Mealey**, 334 U. S. 653, this Court held at page 662:

> "It is significant that, so far as we are advised, no State other than New York seeks to tax the unapportioned receipts from transportation going through more than one State (except to an extent so insignificant as to be disregarded), merely because such transportation returns to the State of its origin. If New Jersey and Pennsylvania could claim their right to make appropriately apportioned claims against that substantial part of the business of appellant to which

> they afford protection, we do not see how on principle and in precedent such a claim could be denied. This being so, to allow New York to impose a tax on the gross receipts for the entire mileage—on the 57.47% within New York as well as the 42.53% without—would subject interstate commerce to the unfair burden of being taxed as to portions of its revenue by States which give protection to those portions, as well as to a State which does not."

Nor is this a case for holding that the interstate commerce involved in this case is a question of de minimis for on the entire trips, these vessels constantly cross the middle of the channel and repeatedly enter the territorial waters of Missouri and Illinois on each trip.

f. The decision of the St. Louis Court of Appeals to the effect that these vessels on the excursion trips remain in the jurisdiction of Missouri and that the salaries of all employees are earned aboard said excursion boats and are subject to the withholding provisions of the earnings tax of the City of St. Louis while on these excursion boats in spite of the fact that the vessels constantly cross into and operate on the territorial waters of Illinois, is an effort on the part of the Missouri Court of Appeals to foreclose any possible claim by the State of Illinois under their State Income Tax Law to claim any part of these wages and the withholding provisions of any part of the wages earned aboard this ship. By doing so, the Court of Appeals does not attempt to apportion claims for taxes by the City nor the State of Missouri with the claim for taxes on wages earned in Illinois under the Illinois Statute. It is exactly to prevent a taxation by both states and their subdivisions and their apportionment that Section 601 was amended in 1959. The St. Louis Court of Appeals wishes to brush the fact aside that on all excursion trips the vessels cross the middle of the channel practically constantly and, thus operate a substantial part of the way in

Illinois territorial waters by saying that as a "practical matter" it would not place these vessels in interstate commerce. That overlooks the specific holdings of this Court that it does.

g. The St. Louis Court of Appeals in its opinion goes on to say that since these vessels start and return to St. Louis without any interruption by mooring or anchoring along this line of travel, withholding of the City Earnings Tax would not place a burden upon them or their employers other than that of any wage earner or employee within the City of St. Louis. Since, however, Illinois impose an earnings tax on the wages earned in that state, the withholding of the wages or part thereof would, contrary to the holding of that Court, place a burden upon the employer other than that of any wage earner or employer in the City of St. Louis and it is specifically for the purpose of avoiding the necessity of the employer having to figure out what portion was earned in Illinois and what portion in St. Louis that this specific Act was passed as we pointed out above at page A-20.

h. The Court finally states in its opinion, speaking of these excursion trips, "For these boats that leave and return to the Port of St. Louis without interrupting their voyage remain at all times within the jurisdiction of Missouri even though at times they cross the middle of the channel" (App. p. A-7). The Court reaches this conclusion by relying upon the Act of Admission of the State of Missouri, 3 U. S. Stat. 545, 1 V. A. M. S. 97, 3 V. A. M. S., Chapter 7, page 11, which sets the boundary line between the States of Illinois and Missouri along the middle of the navigable channel, but confers concurrent jurisdiction on both states over the entire river. The fallacy of this conclusion is easily demonstrated. With the exception by the State of Louisiana, the Mississippi River constitutes a boundary river between all states along its banks. Were the Court correct in its position that the

vessel which starts at one point in Missouri and returns to the same point after an excursion voyage at which it does not stop along the line, but does for a substantial portion of each voyage cross and navigates the Illinois territorial waters; yet because of concurrent jurisdiction of the two states, the vessels remain in the State of Missouri at all times then neither plaintiff-petitioner or any other carrier would require a Certificate of Convenience and Necessity from the Interstate Commerce Commission under Chapter 3, Title 49 of the U. S. Code. The Federal Courts have not looked upon such a conclusion with favor, see **Cornell Steamboat Company v. U. S.**, 321 U. S., supra, nor has the Interstate Commerce Commission, **Sound Steamship Lines**, 250 I. C. C. 488, 3 Fed. Car. Cases, 3387 but have held to the contrary.

The Court's holding that since Missouri has concurrent jurisdiction with Illinois over the entire river, therefore, the vessels never leave Missouri on their trips, is wholly unsound. Were that correct then as soon as these vessels cast off from the Missouri shore, they would automatically find themselves both in Missouri and in Illinois at the same time if "sovereignty" and "jurisdiction" are to be treated as synonymous. If, as here, one finds oneself on a trip in two different states, then to contend that this is not Interstate Commerce completely overlooks the meaning of those words. The difficulty with the St. Louis Court of Appeals in reaching the conclusion is that it does not distinguish between the meaning of the word "jurisdiction" and the meaning of the word "sovereignty."

The same Court of Appeals held in **Smoot v. Fisher**, 248 SW 2d 38, at l. c. 41, as follows:

> "It is to be understood that in conferring concurrent jurisdiction on this state as to acts or transactions occurring on the Mississippi, **it was not intended that there should be concurrent sovereignty or dominion on the river.** On the contrary, in the case

of matters not included in the proper concept of concurrent jurisdiction, each of the adjoining states retains its exclusive control up to the limits of its actual boundary, entirely free from the interference by the other."

The power to tax is a sovereign power, whereas, the power to enforce the laws other than taxing, such as criminal laws, and in certain areas of civil law, is something else again. In **Nielsen v. Oregon**, 212 U. S. 315, 53 L. Ed. 528, 29 S. Ct. 383, the Court, in speaking of the term "concurrent jurisdiction", at page 320 had the following to say:

> "Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel."

The taxing powers of the two states are not concurrent and the judgment of the St. Louis Court of Appeals directing the trial Court to hold that the wages earned by defendants-petitioners aboard these two vessels on their excursion trips are subject to the City Earnings Tax and must be withheld by plaintiff-petitioner is clearly erroneous in that it makes no allowance for those wages which are earned while the vessels are on the Illinois side of the river. It attempts to arrogate taxes on all earnings of these employees to St. Louis excluding any right of the State of Illinois to tax any part of wages earned in Illinois.

It is Hornbook law that the power to tax is strictly limited to the territorial limits of the state. As stated in 61 C. J., Taxation, Section 16:

> "Moreover, the exercise of the taxing power in respect of persons and property beyond the terri-

torial **limits** of the state would vitiate the Fourteenth Amendment of the federal constitution and cases there cited."

See also **Arnold v. Berra,** 366 S. W. 2d 321.

What the City is trying to enforce in this case is a municipal taxing ordinance and not a police regulation. The **City's** power to impose even a municipal police regulation ceases at the middle of the main channel, whereas, as to a police regulation of the **state,** that is concurrent. See the **City of St. Louis v. Lee,** 132 S. W. 2d 1055.

The point we are trying to make is simply that the City of St. Louis may not impose any Earnings Tax on the wages of seamen earned on excursion or other voyages on which the vessels spend on each trip part of the time in Missouri territorial waters and part of the time, without stopping, in those of Illinois; even less can it do so where the State of Illinois also has an Earnings Tax and the trips are clearly in interstate commerce. It is for the purpose of laying at rest the need of employers and seamen to solve the complicated tax questions that the amendment to Section 601 of Title 46 U. S. C. was enacted.

CONCLUSION

This Court has not as yet passed upon the Amendment of 1959 to Section 601 of Title 46, which is here involved, insofar as the immunity of seamen's wages from withholding taxes is concerned earned on vessels plying on boundary rivers such as here and in so doing repeatedly enter into and navigate the territorial waters of an adjoining state. This Court has only held so far that such operations constitute interstate commerce with reference to both the requirement that plaintiff-petitioner is within the operation of Chapter 3 of the Interstate Commerce Commission Act, as well as to gross income derived from trips within one state and passing through an adjoining state, though not stopping in such adjoining state.

From the foregoing, we believe it is also clear that the decision of the St. Louis Court of Appeals decides a question of substance in a way probably not in accord with the applicable decisions of this Court. The decision which we claim is wrong as rendered by the St. Louis Court of Appeals is a matter of grave importance to many carriers, not only on the Mississippi River, but on the Ohio River and, undoubtedly, also on the Columbia River. The Mississippi River forms the boundary between all states bordering its shore other than the State of Louisiana. Consequently, all these bordering states are vitally interested in whether or not a water carrier which operates within the territorial waters under its sovereignty and then crosses into the territorial waters of the adjoining boundary state, though not stopping there, is engaged in interstate commerce, and whether Section 601, 46 U. S. C., applies to such operation. It is a question which this Supreme Court should finally settle rather than the St. Louis Court of Appeals.

Respectfully submitted

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